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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-432

UNITED STEELWORKERS OF AMERICA,

Petitioner,

VS.

BRIAN F. WEBER,

Respondent.

AMICUS BRIEF OF THE WOMEN'S CAUCUS, DISTRICT 31 OF THE UNITED STEELWORKERS OF AMERICA

CHICAGO LAWYERS COMMITTEE FOR
CIVIL RIGHTS UNDER THE LAW, INC.

SYBILLE C. FRITZSCHE
53 West Jackson Boulevard
Chicago, Illinois 60604

EDNA SELAN EPSTEIN
JAMES S. WHITEHEAD
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603

Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

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INTEREST OF THE AMICUS CURIAE

This brief, as amicus curiae, is filed on behalf of the United Steelworkers of America (USWA) District 31 Women's Caucus ("Women's Caucus"). District 31 encompasses the greater Chicago-Gary geographic area and is the single largest USWA district in the United States. The Women's Caucus is not an official body

within the USWA, but is an *ad hoc* grouping of women who work in plants where the collective bargaining representative is the USWA. The views set forth in this brief do not purport to reflect the official position of the USWA either in this case or on the policy issues inherent in this controversy.

The interest of the Women's Caucus in the present litigation is to assure that voluntary affirmative action plans may be entered into between companies and union representatives where the underutilization of women is both apparent and undisputed. Some of the members of the Women's Caucus work for employers now covered by the consent decree in *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). The continued legality of even that decree may be in doubt because of the opinion of the Court below.[1] Others work for companies that, like Kaiser, have voluntarily adopted affirmative action plans modeled upon the *Allegheny-Ludlum* plan. The judgment of the United States Court of Appeals for the Fifth Circuit in *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216 (5th Cir. 1978), suggests that any voluntary affirmative action plan must be predicated upon a prior judicial determination of Title VII liability or an admission of past discrimination by the employer. Still other members of the Women's Caucus work at plants not presently covered by any affirmative action plan. They have an interest in seeing the judgment below reversed because

[1] The validity of the *Allegheny-Ludlum* affirmative action plan is called into question because there was no plant-by-plant analysis in that case to determine whether discrimination had occurred or whether the industry-wide plan was tailored to each individual employment situation.

they wish to have a similar plan negotiated between their employer and the USWA.

Each of the Women's Caucus members has an immediate and direct interest in seeing the concept of voluntary compliance with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, implemented through negotiated affirmative action plans where underutilization of women in the employer's work force exists. Each has an immediate and direct interest in avoiding the protracted delays attendant upon the filing of individual EEOC complaints and federal district court litigation to vindicate their civil right to fair and equitable access to jobs.

The Kaiser-USWA affirmative action plan at issue here provides that 5% of the craft training positions are to be made available to women. The Women's Caucus recognizes that limited as this provision is, it provides the only assurance for industry-wide change and the beginnings of effective access to craft jobs for women without recourse to case-by-case litigation. Without even so minimal a provision for entry into craft training positions, the day of equal access for women in well paying industrial jobs, less strenuous than assembly line work, will be indefinitely postponed.

This brief of *amicus curiae* is filed with the consent of all the parties to Case No. 78-432.[2]

[2] Kaiser, Petitioner in No. 78-435, has also consented to the filing of this brief. No response, approving or disapproving of the filing of this brief has been received from the United States, Petitioner in No. 78-436.

ISSUE PRESENTED FOR REVIEW

May an employer and a union voluntarily negotiate an affirmative action plan that reasonably remedies substantial and uncontested underutilization of minorities and women by that employer in the absence of either an admission or a judicial determination that the employer has been guilty of past discrimination?

SUMMARY OF ARGUMENT

Congress has found that the historic existence of discriminations based upon race, religion, sex, or national origin justifies, as a matter of national policy, prophylactic, voluntary affirmative action plans to assure that such discriminations will not continue into the future. Although Congress provided that *bona fide* seniority systems need not be adjusted to accommodate minorities, it did not prohibit negotiated modification of seniority to provide job access to previously excluded groups.

This Court, in interpreting the intent and scope of the Civil Rights Act of 1964 in general and of Title VII in particular, has repeatedly admonished that conduct seemingly neutral on its face must be measured in terms of its actual racial or sexual impact. This Court has said that the reach of the Act must be prospective as well as retrospective. The Act seeks not only to accord restorative justice to individuals actually harmed by an employer's past discriminatory wrongs. It seeks also to assure that discriminations against entire groups of individuals will not continue into the future.

Given existing substantial underutilization of minority groups in employment, given the national policy of fair and equitable access to jobs without regard to race, religion, sex, or national origin, and given the goal of full utilization of all groups in the national workforce, no plan can be devised, at this moment in time, that in its *impact* is totally neutral with respect to all competing groups. Accordingly, any voluntary affirmative action plan cannot be tested on the basis of whether it is totally neutral racially or sexually. Such neutrality of impact is in all events not possible in a situation where discrimination already exists—whether that discrimination has been caused by historic societal attitudes or the particular conduct of a given employer. Moreover this Court has already, repeatedly, and most recently in *Regents of the University of California v. Bakke*, 46 U.S.L.W. 4896 (1978), recognized that, given the appropriate circumstances, race and sex may be *a* factor in determining access to a scarce benefit. Therefore, the validity of any plan implemented in the context of existing underutilization must be tested not on the basis of whether race or sex constitute one of many factors in the method of selecting individuals for a job benefit, but rather whether that plan impacts unfairly, inequitably and unreasonably upon competing groups.

Accordingly, it is respectfully submitted that the judgment of the Court of Appeals for the Fifth Circuit was in error and should be reversed for the following reasons:

1. It imposes a *de facto* requirement that either an official determination or an admission of past discrimination must be made, on a plant-by-plant basis, as a prerequisite for the implementation of a voluntarily negotiated affirmative action plan. As a result, it effectively thwarts the voluntary achieve-

ment of the aims of Title VII and assures the continuation of present employment underutilizations based on race and sex.

2. It implicitly and erroneously holds that no single factor out of an entire panoply of contractually negotiated seniority rights may ever be modified by an employer and a union and that a racially or sexually conscious selection method may never be employed for purposes of determining equal access to a new job benefit.

3. It accepts as adjudicated fact, in the absence of genuinely adverse parties in respect to that issue, and relies upon the ultimate legal conclusions that there was no discrimination of any kind, in any respect, at any time at the Gramercy plant and that the plant's seniority rosters are, therefore, free of any discriminatory taint.

For these reasons, the judgment of the Court of Appeals for the Fifth Circuit should be reversed.

ARGUMENT

I.

VOLUNTARY EFFORTS BY EMPLOYERS AND UNIONS TO REMEDY SUBSTANTIAL AND UNCONTESTED UNDERUTILIZATION OF CERTAIN GROUPS IN THE EMPLOYER'S WORK FORCE ARE PERMISSIBLE UNDER TITLE VII EVEN IN THE ABSENCE OF AN ADMISSION OF PAST DISCRIMINATION AND EVEN THOUGH A COURT MIGHT NOT ORDER SUCH A REMEDY IN A TITLE VII ACTION.

The underlying purpose of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, is to establish a national policy that continuing vestiges of historic discriminations in employment based upon race,

religion, sex or national origin and the economic and social disabilities that flow from such discriminations will be eradicated. Mr. Justice Powell, in *Regents of the University of California v. Bakke*, 46 U.S.L.W. 4896, at 4907, n.44, observed that the enactment of Title VII was based upon:

> "[L]egislative determinations . . . that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination.
>
> " '[Congress sought] to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory practices.' [Citation omitted]."

The central purpose of the Act, however, is not merely, as the Court below suggests, restorative or compensatory justice for specific wronged individuals after a judicial determination that discrimination has occurred at a specific place of employment. The intent of Congress was that every reasonable means be used to ensure that the effects of discrimination not continue into the future and that the existing underutilization of women and other minority groups in the work force be remedied. Accordingly, the policy objectives of Title VII go well beyond the fashioning of judicial remedies in the form of back pay awards and adjustments to seniority for specifically identifiable individuals after a case-by-case determination that discriminatory conduct has occurred at a particular place of employment.

To correct past and prevent future discrimination, Congress placed primary emphasis in Title VII on

voluntary, private actions. As this Court stated in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1973):

> "Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. [Citations omitted.] *Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.*" (Emphasis added).

And in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975), this Court recognized that the judicial sanctions and remedies in Title VII were primarily intended not as punishments for past misconduct or even as compensatory relief for past harms suffered. Rather their ultimate purpose was to encourage private parties to correct past abuses voluntarily and to see that they did not reoccur:

> "It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions *to self-examine and to self-evaluate their employment practices and to endeavor to eliminate,* so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' *United States v. N. L. Industries, Inc.* 479 F.2d 354, 379 (8th Cir. 1973)." (Emphasis added).

The ruling of the Court below undercuts the thrust of the decisional law in this Court by effectively destroying the possibility of the voluntary adoption of remedial affirmative action plans by employers and unions.

The Court below would not permit reasonable, fair and voluntary efforts to remedy perceived, uncontested and substantial underutilization of minority groups and

women in industry. Instead, the Court would require an admission by an employer that he has discriminated in the past—an improbable eventuality given the likelihood of Title VII suits following any such announcement.[3] Alternatively, the employer and the union run the risk that a Court in any reverse discrimination action would not find sufficient discrimination to justify the affirmative action that was undertaken. As a practical matter, if the Court below is affirmed, employers and unions that wish to remedy the underutilization of females and minorities will, to protect themselves from Title VII liability, have to bring declaratory judgment actions and obtain a judicial determination that past employment discrimination justifies the use of race or sex as one factor in distributing employment benefits. That prospect is an unlikely as is the voluntary admission of past discriminatory conduct by the employer because it too will expose the employer to backpay awards.

Courts have long recognized that substantial underutilization of a minority group is often a conclusive indication that discrimination has occurred. *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972). As this Court recently said, underutilization is often a:

> "[T]elltale sign of discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result

---

[3] Indeed it is unclear whether any such admission would in all events be sufficient in the view of the Court below to permit affirmative action. Employees such as Brian Weber would surely argue, as they implicitly have done here, that only a federal court can determine whether an employer has violated Title VII.

> in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 n. 20 (1977).

See also Dothard v. Rawlinson, 433 U.S. 321 (1977) where this Court confirmed that if the relevant labor market was 36.89% female, but employees were only 12.9% female, a *prima facie* case of discrimination could be established.

The underutilization of women and blacks at the Gramercy plant, both in the general unskilled labor pool from which bidders for the newly established on-the-job training benefit were to be drawn and in the craft positions, is as substantial as it is undisputed. Although the area workforce was 39% black, blacks comprised only 10% of the unskilled Gramercy labor force until 1969 when a one-to-one racial hire ratio was instituted at the gate at the urging of Kaiser's federal contract compliance agency. (Kaiser Petition for Writ of Certiorari, p. 3). There is no indication in the papers available to *amicus* what percentage of the surrounding area work force are women, but women constituted only 5% of the unskilled labor pool at the Gramercy plant in 1975 (District Court, Exhibit No. 4). Nor is there any indication whether any actions were undertaken by Kaiser to remedy its underutilization of women in the unskilled labor force at the Gramercy plant.

At the time of trial blacks constituted 14.8% of the Gramercy plant's general work force. The percentage increase was well under 1% a year. Assuming the same rate of turnover that existed from 1969 to 1975 continues into the future, it will take 36 years or until the year 2011 for the black work force at Gramercy to

reach the 39% that reflects the black work force of the surrounding area. (District Court, Exhibit 4). And given the same rate of turnover, if a one-to-one male-for-female ratio of hire at the Gramercy plant gate is instituted, it would take 56 years or until the year 2031 for the Gramercy unskilled work force to be equally divided between men and women.

Blacks and women were even more markedly underutilized in the 290 craft positions at Gramercy. Blacks filled only 5 of the slots; women none. (District Court, Exhibit 4; Kaiser Petition for Writ of Certiorari, p. 3.) If seniority is to be the sole factor determining access to on-the-job training, equal access to craft positions for blacks and for women will be indefinitely postponed.

It is in the light of this substantial and uncontested underutilization of minorities and women in the Gramercy plant craft jobs that the reasonableness and fairness of any voluntary affirmative action plan must be tested. Where substantial underutilization is found, there is every reason to believe that past discrimination has caused the numerical imbalance. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). In such instances, the voluntary efforts of employers and unions to take reasonable steps to remedy this imbalance can only be viewed as furthering the goals of Title VII. Employers and unions should not be forced, for their own protection, to await a judicial determination that the employer has in fact discriminated as a prerequisite for the implementation of a voluntary affirmative action plan in such circumstances.

Ours is a time of enormous change. It has become increasingly problematic for any woman to be financially dependent upon a man. Whether we as individuals approve or deplore these changes, the facts remain that

divorce and widowhood are frequent. Alimony payments are less common. Child support has become increasingly difficult to collect even where the divorce court has awarded it. Often women are the sole source of support for their families. And even the most traditional and middle class of families has found that in times of rapid inflation a single breadwinner is often inadequate. Economic and social pressures have eroded the American family idyll of the post-war years.

Numbers document the changes in work patterns and in the composition of the work force. The number of women holding jobs has grown from 18 million in 1950 to 42.1 million in 1978, an increase of 129% during a time when the total work force grew only 61.7%.[4] In spite of the overwhelming influx of women into the labor force, on the average women earn proportionately *less* today than they did 22 years ago. In 1955, full-time women workers earned 64% of what full-time men workers did. By 1977 full-time women workers earned only 58.9% of what full-time men workers were earning. In 1977 the median annual income for full-time male workers was $14,626; for full-time women workers it was only $8,618.

Furthermore, 1 in 7 or 14.4%, of all American families are now headed by a woman. These families are also the poorest in our country. Where the median family income in America in 1977 was $23,945, the median family income for female-headed families was only $7,977.

Congress with the passage of Title VII of the Civil Rights Act of 1964 enacted into law the principle that

[4] Compiled by the National Commission on Working Women from U.S. Dept. of Labor and Commerce statistics as of September 1978. The complete statistics are set forth in the Appendix for the Court's convenience.

fair access to jobs cannot be predicated on gender. Without the adoption by employers and unions of easily administrable and objective mechanisms to assure compliance with that law, women will continue to be relegated to lower paying, lesser status jobs and the poverty that those jobs entail. Only the voluntary adoption of reasonably drawn affirmative action plans can assure women full and rapid integration into the American work place and make real for them the promise of Title VII that discrimination on the basis of sex will not be tolerated.

The effect of the opinion below is that women will be forced to rely on slow, expensive, and case-by-case litigation to obtain access to jobs that, but for discriminatory barriers, they would have occupied years ago. EEOC charges and court actions will be more numerous; delays extensive; results inconsistent; the cost in judicial resources enormous. Neither justice nor national policy will be served.[5] By erecting these roadblocks to voluntary compliance, the Court below thwarts the realization of the goals of Title VII. It destroys the very mechanism that Congress viewed as the most effective means of fulfilling those goals.

The spirit and the intent of Title VII are clearly furthered by the uncoerced implementation of reasonable affirmative action plans carefully designed to accommodate competing claims of individuals while ameliorating the undisputed and continuing exclusion of

[5] As an example, in *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir. 1978), involving a sister plant to Kaiser's Gramercy facility, the plaintiff was issued a right to sue notice by the EEOC in 1967. The case was not tried, however, until 1973. The Fifth Circuit reversed the entry of judgment for the employer in 1978, nearly 11 years after the administrative process had ended.

females and minorities from certain jobs. The invalidated Kaiser-USWA affirmative action plan fulfilled the purposes of Title VII with a minimum of compensatory harm to competing white males. The holding of the Court below to the contrary should be reversed.

II.

CONTRACTUAL RIGHTS, INCLUDING SENIORITY BENEFITS, MAY BE VOLUNTARILY ADJUSTED IN NEGOTIATIONS BETWEEN AN EMPLOYER AND A UNION, ACTING IN GOOD FAITH AND REASONABLY REPRESENTING THE INEVITABLY COMPETING INTERESTS OF ITS MEMBERS.

There are two premises that guide the opinion of the Court below. One premise is that, if a court in fashioning a remedy in a Title VII action might not employ a race conscious selection method, then an employer and a union may not voluntarily do so either.[6] The other premise is that seniority benefits that might be predicated upon seniority must be so predicated, regardless of the fact that there are other desirable societal ends to be accomplished or that the competing interests of the members of a union must be accommodated. It is respectfully submitted that both premises are in error.

[6] There are instances where under Title VII, a court may not award relief: *e.g.*, where no timely complaint has been filed with the EEOC, *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977); where victims of discrimination cannot be specifically identified, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); where the discrimination was pre-Act, *Id.*; where discrimination continues only because of the operation of a *bona fide* seniority system that pre-existed in respect to the available benefits. *Id.* Clearly, however, none of these decisions stand for the proposition that employers and unions may not voluntarily provide remedies for the perpetuation of discrimination where a court may not do so.

The Court below suggests that private parties have no more, and indeed may have less, scope of action than a court does in seeking to ameliorate the existing exclusion of certain groups from the work force. As Judge Wisdom in his dissent suggests the test for approving a voluntary affirmative action plan should not be whether a court might or might not grant Title VII relief. The rule of law can only be that where underutilization is uncontested and consequently past discrimination is likely to have occurred, race and sex may be used as one of many factors to select job applicants in order to remedy that underutilization.

Nothing in either Title VII or the decisions of this Court suggests that employers and unions are powerless voluntarily to adopt affirmative action plans to remedy existing employment inequities. Such a conclusion would mean that white, male employees, who have benefited from the underutilization of females and minorities, have acquired the equivalent of vested rights that can not be changed by the voluntary actions of employers and unions in collective bargaining agreements.

Yet Brian Weber has no vested right to have selection for the craft training program made on the basis of either seniority or any other particular selection method.[7] Only if this Court is prepared to hold that selection by lottery from two separate pools would also violate Title VII in this case can Brian Weber hope to prevail. For the Court of Appeals has implicitly held

[7] Indeed, Brian Weber has not claimed that he has rights arising from Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h). That Section provides that *bona fide* seniority systems that may retard the speedy entry of minorities and women into the work force need not necessarily be changed. It does not mandate that all benefits that might flow from seniority must be contingent upon seniority alone.

that where seniority might have been the sole determinant for allocating a new job benefit, it must take precedence over any accommodation as to race or sex that would remedy underutilization. Only if all aspects of industrial seniority are deemed, for all purposes, to be incapable of modification by a union in an effort to remedy historic patterns of discrimination can Brian Weber's claim that equal access to a new benefit on the basis of multiple seniority pools constitutes reverse discrimination against him as a white male prevail. If the Court is prepared to concede that applicants for the new job benefit could have been chosen from multiple pools based on lottery, then the mere fact that seniority within each group is also made a factor in determining selection becomes totally non-dispositive. The Court of Appeals has in effect accepted the argument, as did the District Court, that seniority must take precedence over race and sex in selecting applicants for a new job benefit.

The District Court tacitly recognized that it was according plant seniority a protection not required by Title VII. At the very beginning of its opinion the District Court concedes:

> "This Court is aware of the fact that seniority rights are not vested, but rather derive their scope and significance from union contracts. Furthermore, it is well established that seniority rights are subject to alteration with each successive bargaining agreement, since seniority is a valid subject matter for the collective bargaining process. [Citations omitted]." *Weber v. Kaiser Aluminum & Chemical Corp.*, 415 F.Supp. 761, 765 (D. La. 1976).

Yet, having admitted that seniority is a fragile reed indeed upon which Brian Weber's claim of greater entitlement rests, the District Court, without analysis of

the consequences, accepted the proposition that seniority must take precedence for the allocation of all benefits even where the underutilization of minority groups and women is uncontested. The Court of Appeals followed suit without considering the impact of its invalidation of the Kaiser-USWA plan nor the impact that the use of seniority alone as a selection method would have on the perpetuation of discrimination against blacks and females at Gramercy.

Seniority is not a fixed, unchanging concept in the industrial context. Seniority is whatever the union and the employer, through collective bargaining, define it to be for the allocation of whatever benefits they agree upon. Although this Court has said that a court may not adjust *bona fide* seniority rights merely because they provide a disproportion benefit to a given class of workers, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the converse proposition that a seniority system can never be voluntarily modified by an employer and a union, negotiating on behalf of all of its members, does not hold.

The cases decided by this Court in the context of challenges to negotiated adjustments to seniority provide ample precedent for the proposition that seniority rights are valid subjects for collective bargaining agreements and that unions may take any number of issues into account in negotiating modifications in the order of seniority or in the benefits that derive from seniority rights. *Humphrey v. Moore*, 375 U.S. 335 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1952); *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521 (1949).

In *Aeronautical, supra,* this Court held that in order to effectuate the underlying purposes of collective bargaining shop stewards and union chairmen, with less seniority, could be given seniority preference, by collective bargaining, over veterans in spite of the provisions of the Selective Training and Service Act of 1940, as amended, 50 U.S.C. § 308, that provided that servicemen were not to be penalized in their seniority status as a result of their military service. Remarking on the multiple possible variations, definitions, and factors to be considered in determining seniority, the Court concluded:

> "All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining." 337 U.S. 521 at 526.

It is inconceivable that the seniority rights of servicemen, explicitly protected as they were by statute, should be adjustable to accommodate union personnel, but that seniority rights may not be adjusted to accommodate the principle of equal racial and sexual access to a newly created job benefit in order to remedy uncontested underutilization of excluded groups of individuals.

No adjustment for an excluded minority is ever possible in a world of scarce resources without some diminution in the benefits that would otherwise be enjoyed by the heretofore privileged majority. The paradox in the instant case is that no vested right is being taken away from Brian Weber's class of white males. The benefit for which individuals from each racial group are now bidding in the order of their seniority within their group did not exist prior to the negotiation and adoption of the voluntary affirmative action plan here at issue. Prior to the adoption of the very collective bargaining agreement he now attacks, Brian Weber had no more expectation of access to the Gramercy craft positions than any black or female bidder for that position. Weber is not being divested of his rightful place in order to make room for a black or a woman. He is being asked to compete on a one-to-one basis for access to a benefit that prior to 1974 he had no expectation of obtaining.[8] Nor is there any indication in the record whatsoever that any other of the benefits that flow from Brian Weber's seniority rights have in any manner been modified or adjusted to compensate blacks or women for past discrimination.

The Kaiser-USWA plan guarantees entry to job training positions on a one-to-one ratio in order of seniority within each pool.[9] Weber's alternative plan would make seniority the sole determinant. The consequence of using seniority as the sole selection factor would be that no blacks or women would be admitted into the training program in the first year or indefinitely thereafter.[10] In return for having access to these positions for the first time, Brian Weber's class is being asked to share the opportunity to enter the program with equally well qualified blacks and women who may happen to have lesser seniority.

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[8] Even after the plan was instituted only 13 of 35 craft slots were filled from within the plant. 22 were filled by hire outside the plant. White males still obtained 27 of the total craft positions, black males only 7. There is no indication if women received any of the slots. (Trial transcript 59). Arguably that disproportionate impact of craft hiring upon blacks and females itself constitutes *prima facie* evidence of continuing racial and sexual discrimination.

[9] Kaiser wished to make access to the new job benefit available without regard to seniority at all. The insistence of the USWA, seeking to protect older white employees, resulted in the incorporation of the seniority provision. (Trial transcript 108).

[10] USWA Petition for Writ of Certiorari, p. 7.

It is precisely this weighing and balancing of relative advantages and disadvantages to various constituent groups of its membership that unions have traditionally been able to undertake through the collective bargaining process. As this Court said in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 388 (1952):

> "Inevitable differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. *A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents*, subject always to complete good faith and honesty of purpose in the exercise of its discretion." (Emphasis added).

It is in the context of that admonition that the impact of the two competing plans, that negotiated by the USWA and Kaiser and the strict seniority approach of Weber, must be evaluated. There can be no question but that the plan adopted by the USWA and Kaiser best accommodates the competing needs of all of the union's members, black and white, male and female.

The primacy placed on seniority by the Court below, on the other hand, would assure that for an indefinite time white males would be entitled to all of the Gramercy plant's craft training positions. That pattern would continue into the future until the seniority pools would themselves become more equalized on the basis of race and sex. This Court has held that courts have not only the power, but the duty to render decrees that "eliminate the discriminatory effects of the past *as well as bar like discriminations in the future.*" (Emphasis added). *Louisiana v. United States*, 380 U.S. 145, 154

(1965). And in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), the Court said:

> "The Act proscribes not only overt discrimination, but also practices that are fair in form, but *discriminatory in operation.*" (Emphasis added).

See also United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). Surely a union and an employer must not be penalized for good faith, reasonable efforts to obtain this same result.[11]

It is respectfully urged that the Court below, in overlooking the marked impact that a plan based on seniority alone would have on indefinitely continuing the underutilization of blacks and women in the craft positions at the Gramercy plant, has used the letter of Title VII to eviscerate its spirit.

III.

THE CRUCIAL FINDING THAT NO DISCRIMINATION EXISTED AT THE GRAMERCY PLANT CANNOT BE UPHELD BECAUSE OF THE ABSENCE OF ANY GENUINELY ADVERSE PARTY WITH RESPECT TO THAT ISSUE.

It is the position of the Women's Caucus that findings of past discrimination by an employer at a given plant are not an essential prerequisite for the voluntary adoption of an affirmative action plan. Should this Court deem that Brian Weber's class is entitled to preferential entry to a new job benefit because he happens to have seniority, then it is the position of the Women's Caucus that Brian Weber's seniority position at Gramercy is in

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[11] If the ruling of the Court of Appeals is correct, some members of Brian Weber's class presumably can obtain back pay damages.

all events discriminatorily tainted and that it was plain error to have found to the contrary. The equitable appeal of Weber's position can only be maintained if there is a finding that he has not been the beneficiary of past discrimination directed at other groups of competing employees or would be employees.

The finding of no prior discrimination at the Gramercy plant is in all events a legal conclusion, reviewable by this Court. *Cf. International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). But whether it be denominated a factual finding or a legal conclusion from which legal and equitable liabilities and remedies may flow under Title VII, no such finding can be made in the absence of genuinely adverse parties with respect to that issue.

As Judge Wisdom remarked in his dissenting opinion, none of the parties to the litigation had the least interest in seeing the trial court make a determination that discrimination had occurred either in craft hiring or in the hiring of the unskilled labor force at the Gramercy plant. Kaiser could not concede discrimination either in its craft hiring or in its hiring of the unskilled labor force without courting a back pay class action brought on behalf of its black or female employees. Weber could not permit such a finding to be made without destroying the essential prerequisite for his claim to greater entitlement on the basis of seniority alone. The USWA could not squarely raise the issue without running the dual risk of perhaps being collusively liable for any past discriminations of the employer and alienating the majority of its membership.[12]

[12] Brian Weber himself is the chairman of the local USWA grievance committee and is a member of the local's negotiating committee. His own claim of seniority is junior to that of 35 to 40 other unsuccessful white, male bidders for craft training positions. (Trial transcript, p. 94).

Both the District Court and the Court of Appeals permitted the adjudication of this issue where the genuinely adverse parties—blacks and women—were neither parties to the litigation nor directly before the Court. No adjudication can be made that effectively operates to preclude the rights of parties neither before the Court nor directly represented. Such preclusion without representation violates principles basic both to common, statutory, and constitutional law.[13]

Rule 19(a) of the Federal Rules of Civil Procedure provides that:

> "(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . (2) he claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest . . ."

There is no doubt that blacks and women workers at Gramercy are so situated that they both claim an interest in the subject matter and that their ability to protect that interest is now severely impaired. Their joinder would have been feasible and would not have divested the court of jurisdiction. Where, as here, the judgment below, for all practical purposes, has the effect

[13] It is no answer to suggest, as Brian Weber seems to in his response to the petitions filed in this Court, that black or women workers at the Gramercy plant had a duty to intervene in the litigation since they should have known the lawsuit might result in the preclusion of their basic civil rights. Weber's Brief in Opposition, p. 20 *et seq.* It is the duty of the parties to join any persons not present before the Court whose rights are to be definitely determined. Federal Rules of Civil Procedure, Rule 19(a). Alternatively it is the duty of the Court to refuse to proceed to so crucial a threshold finding that is dispositive of the rights of absent parties.

of *res judicata* upon the absent individuals, they, in all good conscience, should have been before the Court. *Provident Bank v. Patterson*, 390 U.S. 102 (1967). *Cf. LeBeau v. Libby-Owens-Ford Company*, 484 F.2d 798 (7th Cir. 1978).

Two possible types of discrimination should have been at issue in the trial court: discrimination in craft hiring and discrimination in the hire of the unskilled labor force prior to 1969. A finding of discrimination in craft hiring would have justified the judicial imposition of the affirmative action plan invalidated here. A finding of discrimination in the hiring of the unskilled labor force would have operated to taint the pre-1969 seniority rosters upon whose non-discriminatory purity Brian Weber's class relies to establish their claim of prior entitlement. Yet it was in the interest of all of the parties before the trial court that neither finding of discrimination be made.

Moreover, the issue of whether Kaiser discriminated in its hire of craft workers at Gramercy was permitted to hopelessly obscure the far more significant fact that Brian Weber is laying claim in all events to a priority based upon a tainted seniority roster.[14]. The District Court made, and the Court of Appeals let stand, the finding that no discrimination occurred at the Gramercy plant from 1958, when the plant opened its gates, to 1975, when the case was tried. Yet the facts themselves are not in dispute. They directly and uncontrovertedly contradict the legal conclusion that no discrimination occured at any time or in any respect at Gramercy.

[14] Nothing in the record addresses the issue of whether Kaiser discriminated in its hire of women and therefore whether the affirmative action plan that provides them with access to 5% of the craft jobs can be justified even under the theory of the Court of Appeals.

Until 1969, when a one-to-one hire of blacks and whites at the Gramercy plant was begun, blacks made up only 10% of the work force. Whatever method of hire Kaiser utilized prior to 1969 had a decidedly and undeniably discriminatory impact upon blacks. The record is totally barren with respect to Kaiser's hiring methods for both blacks and women in the pre-1969 era or for unskilled women at the Gramercy plant thereafter. Kaiser apparently has had no difficulty in obtaining substantial numbers of well-qualified blacks for its unskilled work force since 1969.

The conclusion is inescapable that whatever method of hire was used in respect to the unskilled labor force prior to 1969 was discriminatory. Brian Weber was hired in the pre-1969 era, *Weber v. Kaiser Aluminum & Chemical Corp.*, 415 F. Supp. at 463, and is himself, therefore, the beneficiary of whatever undisclosed, unknown, and judicially ignored hiring practices were in effect before 1969, whose discriminatory impact upon the Gramercy unskilled labor force is neither disputed nor explained.[15] The District Court erroneously accepted mere statements of good faith on the part of Kaiser as proof of non-discrimination. Good faith and good intentions do not constitute defenses to a charge of discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

On the uncontested facts, the legal conclusion that discrimination has occurred from the adoption of the Act to 1969 is inescapable, and the finding that no

[15] Moreover, we have no way of knowing whether any of the blacks now at Gramercy attempted to obtain unskilled jobs at the plant prior to 1969, but were refused. Mr. Weber's Brief in Opposition, p. 20 *et seq.* contends that none of the parties raised that factual issue. Of course not. The interested parties were not before the Court.

discrimination occurred at the Gramercy plant since 1958 is plainly erroneous. Accordingly, the seniority rosters prior to 1969 are fatally tainted by that discrimination. The courts have routinely adjusted seniority rosters to determine access to a job benefit, where such taint has been found. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *United States v. Navajo Freight Lines, Inc.*, 525 F.2d 1318 (9th Cir. 1975); *Gamble v. Birmingham Southern R.R. Co.*, 514 F.2d 678 (5th Cir. 1975); *Reed v. Arlington Hotel Co., Inc.*, 476 F.2d 721 (8th Cir. 1973), *cert. denied*, 414 U.S. 854 (1973); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971); *Local 189, United Papermakers and Paperworkers*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

Given all these facts and given the uncontested underutilization of women and blacks in Gramercy's craft positions, the employer and the union had every reason to voluntarily negotiate the affirmative action plan here at issue without the interposition of any judicial determination and without the formal admission of past discrimination. The plan fairly and reasonably remedied uncontested underutilization of women and blacks in the Gramercy plant crafts with the least possible adverse impact upon competing white males. The purpose and the effect of the plan was:

> "[T]o assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1972).

To invalidate such a plan is to guarantee that the status quo will be indefinitely frozen. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971). Title VII not only does not prohibit, but requires the adoption of such a plan.

CONCLUSION

Wherefore the Women's Caucus of District 31 of the USWA respectfully requests that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed, that the permanent injunction entered by the District Court be dissolved, and that the USWA-Kaiser collective bargaining agreement be found to be consistent with Title VII of the Civil Rights Act of 1964

Respectfully submitted,

CHICAGO LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER THE LAW, INC.

SYBILLE C. FRITZSCHE
53 West Jackson Boulevard
Chicago, Illinois 60604

EDNA SELAN EPSTEIN
JAMES S. WHITEHEAD
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603

APPENDIX

An Overview of Women in the Workforce

42%—42.1 million—of the U.S. work force are Women. In 1977, 56% of Women 16 and over worked all or part of the year.

During the last decade the labor force expanded beyond government estimates. A key factor for this expansion has been the large influx of women workers. The number of women holding jobs has grown from 18 million in 1950 to 42.1 million in July 1978, a 129% increase. The total work force has grown from 62.2 million in 1950 to 100.6 million in July 1978, a 61.7% increase.

The overall pattern of growth does not focus, however, on movements within the different segments of women in the labor force. Participation rates vary considerably among women of different ages, family and marital status, race, and educational levels as outlined below.

Of the Women in the Workforce in March 1978, Nearly 80% were in Clerical, Sales, Service, Factory or Plant Jobs

According to the seasonally adjusted data released in March 1978, women workers were divided into the following occupational categories:

Professional-technical	16.1%
Managerial-Administrative	6.3%
Sales	6.8%
Clerical	34.7%
Craft	1.7%
Operative	11.2%
Non-Farm laborer	1.6%
Service, including private household	20.5%
Farm laborer	1.1%

These data do not show the concentration of men and women into certain job titles. For example, in professional jobs 60% of the women are non-college teachers or nurses, while men tend to be lawyers, doctors, or college professors. Within each occupational category the wages between men and women vary considerably. For every dollar earned by a man, a woman in the same job category earns significantly less. As of May 1977, the wage gap was:

	Women	Men
Sales	$.45	$1.00
Clerical	$.64	$1.00
Service	$.65	$1.00
Manufacturing	$.59	$1.00

In 1977 Full-Time Women Workers Had a Median Income* of $6,256 Less Than Men

Women working full-time, year round in 1977 had a median income of $8,814, while men's income averaged $15,070. Women made 58.5¢ to every dollar made by men. In 1955, women's median income was $2,734 to men's $4,246 (64.3¢ to the dollar made by men.)

Women of Spanish origin had the lowest income of any racial/ethnic group. Their income was less than half of white male's. In 1977, the medium annual income for men and women by race was:

		Percent of White Males
White Males	$15,378	100%
Spanish Origin Males	$10,935	71.1%
Black Males	$10,602	68.8%
White Females	$ 8,870	57.6%
Black Females	$ 8,290	53.9%
Spanish Origin Females	$ 7,599	49.4%

**Income includes earnings plus social security, investments, etc.*

On an Average, Women Who Work Full-Time Earn 59 Cents for Every $1 Earned by Men

During the last 25 years, women's earnings as a percent of men's have dropped steadily. In 1955, full time women workers earned 64¢ to men's one dollar. By 1960 this figure had dropped to 61¢. Ten years later in 1970, women's earnings were calculated to be 59.4¢ per men's one dollar. 1977 census data show that the median annual earnings for full time male workers was $14,626 and for female workers was $8,618 or 58.9%.

In 1976, About One in Every Ten Working Women Belonged to a Union

Of the 38 million women workers in 1976, 11.3% belonged to a *labor union*, down from 12.6% of women workers in 1970. Between 1970-76, the number of unionized working women increased from 4 to 4.3 million, a 7.5% increase. The total number of union members increased from 19.2 to 19.5 million,

a 1.5% increase. Women were 20.7% of all union members in 1976.

15.9% of all working women belonged to *unions and associations* in 1976. Women members increased from 5 to 6.1 million, a 22% increase; while overall membership increased from 21.1 to 22.8 million, a 33% increase, between 1970-1976.

The following percentage of all women in these occupations were union members in 1975:

34.1% of blue collar workers, including craft, operatives and non-farm laborers
11.5% of clerical workers
11.1% of service and private household workers.
6.2% of sales workers

For further information see August 1978 *Monthly Labor Review*, "Women in Labor Organizations: Their Ranks are Increasing," Bureau of Labor Statistics, U.S. Department of Labor.

Nearly 7 Out of Every 10 Women Born Between 1954-1958 are Now in the Work Force

In July 1978, 69% of women between 20 and 24 years of age, and 62% of women between 24 and 34 years of age, were working or looking for work. These figures have increased from 46% and 36%, respectively, in 1960. The only age group in which fewer than one-half of women currently work for pay is that group of 55 and over.

PERCENTAGE OF WOMEN IN U.S. LABOR FORCE

	Annual Averages			July 1978 Seasonally Adjusted
	1960	1970	1977	
18 and 19 years	50.9	53.6	60.5	62.4
20 to 24 years	46.1	57.7	66.5	69.1
25 to 54 years, total	42.9	50.1	58.4	60.5
25 to 34 years	36.0	45.0	59.5	62.6
35 to 44 years	43.4	51.1	59.6	61.5
45 to 54 years	49.8	54.4	55.8	57.3
55 to 64 years	37.2	43.0	41.0	40.9
65 years and over	10.8	9.7	8.1	8.5

The Number of Married Women in the Work Force is Over 5 Times as Large as in 1940

The change in distribution of married women workers (husband present) has been the most dramatic of all categories of female jobholders. In 1940, these married women comprised only 30%, or 4.2 million, of all women workers. In March, 1978, 55.6% nearly 23 million, of all female workers were married with husbands present.

Since 1970 the number of divorced women workers has doubled—the number rose from 1.9 million in 1970 to 3.9 million in March 1978. The number of never married single women jobholders increased from 7 million in 1970 to 10.2 million in 1978.

Overall, of the 42 million working women in the United States, 25% are single, 56% are married, 4% are separated, 5.5% are widowed and 9.5% are divorced.

The highest participation rate (74%) of any group of women classified by marital status are those who are divorced. In March, 1978, percentages of women jobholers 16 years or older in the various groups were never married—60.5%; married, husband absent—56.8%; husband present—47.6%; and widowed—22.4%.

More Than Half of All Husband-Wife Families in 1978 Had Two or More Wage Earners

In March 1978 there were 57.2 million families in the United States. Of these 47.4 million had both husband and wife present, representing 83% of all families. In nearly 6 out of 10 of all husband-wife families, both partners held paid jobs.

Female-headed families accounted for 8.2 million, or 14.4% of all American families, while male-only headed families totaled 1.6 million.

At the top of the family income scale are those with two or more earners—the husband and second family member other than the wife, though she is present. The median income for these families in 1977 was $23,945. At the bottom of the family income scale, excluding those without earners, are single-earner families headed by women. These families have a medium income of $7,977 per year.

Average American family incomes for 1977 were:

Total, all families	$16,146
one earner	13,218
two earners or more	20,415
Husband-wife families, total	17,720
Total, families headed by women	7,765
Total, families headed by men	14,538

The National Commision on Working Women is a nongovernmental, action-oriented body. It was created to focus on the needs and concerns of that approximate 80% of women in the workforce who are concentrated in lower-paying, lower-status jobs in service industries, clerical occupations, retail stores, factories and plants.

Commission members are women and men representing business, labor, the Congress, the media, academia and working women themselves. As its secretariat, the Center for Women and Work implements the Commission's programs, seeks to achieve its overall goals, and serves as a national exchange for ideas, information and research related to the world of women in the workforce. The center it a separate operational unit within the National Manpower Institute, a private, nonprofit organization dedicated to "the fullest and best use of the human potential." Major funding is through a grant from the National Institute of Education (Department of HEW), with special project funds from the Ford Foundation and the Rockefeller Family Fund, and private corporations. Sources for statistics are: U.S. Departments of Labor and Commerce, September 1978.